United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1100

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To be argued by
JOHN D. JESSEP

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
Appellee :

VS. : Docket No. 75-1100

STEVEN POND and
DAVID G. FANELLI,
Appellants :

BRIEF FOR APPELLANT
DAVID G. FANELLI

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN D. JESSEP, ESQ.
KOSKOFF, KOSKOFF, RUTKIN & BIEDER
Attorney for Appellant
David G. Fanelli
1241 Main Street
Bridgeport, Connecticut 06604
(203) 336-4406

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* * *

BRIEF FOR APPELLANT DAVID G. FANELLI

* * *

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the misrepresentation found by the trial court in the affidavit submitted in support of the search warrant was a "material" misrepresentation, thereby requiring suppression of the fruits of the search warrant.

2. Whether the misrepresentation found by the trial court in said affidavit was made in such manner to require suppression irrespective of materiality.

STATEMENT OF THE CASE

On December 30, 1974, David G. Fanelli pled guilty to Count I of an Indictment charging him with conspiracy to distribute marijuana in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(B). On February 27, 1975, David G. Fanelli was sentenced to fifteen (15) years imprisonment and committed to Danbury Federal Correctional Institute for study, as provided by 18 U.S.C. §4208(c), with findings to be submitted to the Court. The commitment began March 5, 1975, running for ninety (90) days.

On March 24, 1975 David G. Fanelli filed notice of appeal.

STATEMENT OF FACTS

On December 4, 1973, Ed McCravy of the Drug Enforcement Administration in San Diego, California received word from an informant that one "Bill" Pond had purchased a ticket for New York City on the 4:30 p.m. Amtrak train and had checked two pieces of luggage which the informant believed contained marijuana. The informant indicated the claim-check numbers of the baggage, gave a description of Pond, and stated that items were a footlocker and a blue/gray suitcase weighing 35 and 50 pounds respectively. The informant also revealed that the train was "Number 40 - the Broadway Limited, bound from San Diego to New York City via Chicago, Illinois, scheduled to arrive Friday, December 7, 1973 at 10:00 a.m." (Affidavit in Support of Application for Search Warrant, contained at the end of Judge Pierce's Memorandum Opinion pp. 18 - 19 of Appellant Fanelli's separate Appendix).

On December 5, 1973 Mr. McCravy telephoned this information to Special Agent George Sweikert in New York City (Transcript of Hearing on Motion to Suppress, hereinafter T., at 12). Mr. Sweikert prepared the affidavit and a search warrant was issued by Magistrate Martin D. Jacobs.

Armed with the search warrant, Sweikert and others went to Penn Station and, posing as baggage handlers, executed the

search warrant on the footlocker before the baggage was claimed (T. at 120). They discovered marijuana bricks in package form (T. at 121, 152, 159-160). Shortly, the baggage was claimed by Pond (T. at 116-117) accompanied by Fanelli (T. at 119). As they left, Pond was carrying the footlocker and Fanelli was carrying the blue-gray suitcase and a maroon suitcase (T. at 118-119). Pond and Fanelli were placed under arrest and taken to the New York Drug Enforcement Administration office where the two suitcases were opened and found to also contain marijuana in brick package form (T. at 112, 120). The packaging of these marijuana bricks in both suitcases and the footlocker involved a reddish-type paper over which was sealed a clear plastic wrapper. They were contained by a garbage bag and covered by talcum powder (T. at 159-160, 162, 166).

Counsel for both Pond and Fanelli moved to suppress all fruits of the search. At hearing Judge Pierce ruled that the affidavit in support of the search warrant was sufficient (T. at 3) and that the maroon suitcase, although not specified in the search warrant, was validly seized and searched (T. at 3). Subsequently the court ruled that the maroon suitcase be suppressed (Memorandum Opinion by Pierce, J. at 15 of Fanelli's Appendix).

At the hearing, testimony was taken from Sweikert, McCravy and the agents who executed the search warrants and effected the arrests. Based on the testimony, Judge Pierce found that the statements in that affidavit by Agent Sweikert that the footlocker and the blue-gray suitcase were disproportionate in baggage weight to size ratio (paragraph 7 of the affidavit, Fanelli Appendix at 7,19) were not given to Agent Sweikert by Agent McCravy (T. at 24, 130). Judge Pierce concluded that this misrepresentation was not intentional and therefore did not per se invalidate the search warrant. Therefore, the court went on to determine if the misrepresentations were material, i. e. "whether or not smell is sufficient by itself" (T. at 130).

Other inaccuracies developed at the hearing. Agent Sweikert had alleged in the affidavit at paragraph 6 that he was told the following by Agent McCravy:

> That said source of this information has proven himself reliable in the past based upon approximately 40 cases leading to over 70 arrests and an aggregate recovery of marijuana in excess of 2000 pounds. That said source relies among other things, on an acute sense of smell which has been invariably accurate in the past detection of marijuana in similar circumstances as those at present. That he detected marijuana under similar circumstances about five weeks ago, and that among his many instances of detection there was one seizure of over 120 pounds of marijuana at Penn Station, N. Y. C. within the

> past year that was contained in a foot locker and a suitcase under similar conditions as those here.

Fanelli Appendix at 19.

This information could only come from Agent McCravy (T. at 48). However, Agent McCravy had a different version of what he told Agent Sweikert. It developed that the informant (who was Amtrak Superintendent in San Diego) had assisted in merely 25 to 30 cases rather than the reported 40 cases (T. at 17, 29, 100) and not all the cases involved marijuana (T. at 100-101). Furthermore, in only half of these cases was smell a determining clue as to whether the baggage contained marijuana (T. at 101).

As noted by the court, (T. at 72), the informant gave no information as to how he came to smell the marijuana (T. at 24, 26). Counsel sought to examine the informant on his method in detecting the marijuana odor in the case at bar, his abilities to detect marijuana wrapped in paper, cellophane and garbage bags, and to elicit any "marijuana-smuggler" profile which the informant used to ascertain the presence of marijuana, but this was denied by the court (T. at 68, 74, 132-33, 185) based on UNITED STATES V. DUNNINGS, 425 F.2d 836 (2nd Cir. 1969) cert. den. 397 U.S. 1002 (1970).

Thereafter, the court decided that the misrepresentation as to the disproportionate weight was not material and that the affidavit was sufficient without it.

On December 30, 1974, Fanelli pleaded guilty to Count I of the indictment and it was stipulated that the issues raised at hearing were reserved for trial.

ARGUMENT

I. THE MISREPRESENTATION WAS MATERIAL

Because Judge Pierce found the allegation in the search warrant affidavit regarding the disproportionate-size weight ratio to be a misrepresentation, the trial court construed the suppression issue as ". . . whether or not smell is sufficient by itself". (T. at 130).

The case law on smell as probable cause deals mainly with alcohol or drugs. In TAYLOR V. UNITED STATES, 286 U.S. 1 (1932), the Supreme Court first examined the probative value of smell vis a vis the tenets of the Fourth Amendment. In TAYLOR, a squad of prohibition agents were returning to Baltimore and decided to stop by a defendant's premises, about which there had been complaints for over a year. At 2:30 a.m. they went to defendant's garage where they smelled whiskey. They shined a light inside and saw many cardboard cases which they thought probably contained whiskey. Meanwhile defendant came from his house and was arrested, whereupon the agents entered the garage and seized 122 cases of whiskey. The Supreme Court held the search effected without a warrant illegal because the complaints extending over a year had given the agents much time to obtain a search warrant. Furthermore, there was no reason why a warrant could not have been obtained after the agents smelled the

whiskey. The Court held that

> [p]rohibition agents may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees (Const. Amend. 4) against unreasonable search.

Id. at 6.

Smell and the fourth amendment again reached the Supreme Court in JOHNSON V. UNITED STATES, 333 U.S. 10 (1948). A narcotic officer received information from a narcotic-using informant that opium was being smoked at a hotel. The informant told the officer a second time that he could smell burning opium in the hallway. The officer and four federal narcotics agents who were experienced in narcotics work proceeded to the hotel. At once they all recognized a strong odor of burning opium which to them was distinctive and unmistakable. This odor led them to a room where they knocked and demanded entry. A woman answered and was placed under arrest, the room was searched, and the officers found opium and smoking apparatus. The government defended the search as incident to a lawful arrest. The Supreme Court held the search illegal because it preceded and gave cause for the warrantless arrest. No crime was committed in the officers' presence until the hotel room door was opened. In dicta, the Court commented that it was not holding that odor could not

support the issuance of a search warrant, Id. at 13.

The Second Circuit cases reveal no decision authorizing the issuance of a search warrant on smell alone. The post-JOHNSON V. UNITED STATES search warrant cases dealing with smell begin with UNITED STATES V. WEST, 328 F.2d 16 (2nd Cir. 1964) where after seven days of surveillance, government agents obtained a search warrant based on their smell of whiskey in defendant's vehicle and premises, defendant's use of jugs usually used for illicit whiskey, the fact that defendant's basement windows were blacked out and the presence of heavy condensation on all windows. The warrant was upheld on appeal. In UNITED STATES V. GILLETTE, 383 F.2d 843 (2nd Cir. 1967) government agents received a search warrant based on their allegations that two agents had smelled fermenting mash on two occasions at defendant's garage, that defendant had been a frequent violator of the alcohol tax laws, that defendant had used various circuitous routes to evade being followed to his garage, his truck appeared to be heavily laden upon departure from the garage, and that anonymous information had been received indicating defendant was operating a still. Again the warrant was upheld.

In UNITED STATES V. LEWIS, 270 F. Supp. 807 (S.D. N.Y. 1967) aff'd 392 F.2d 377 (2nd Cir. 1968), cert. den. 393 U.S.

891 (1968) two agents swore that defendant was convicted of a previous alcohol violation and that while at the door of defendant's apartment for forty-five minutes they detected a strong mash alcohol odor emanating from cracks around the door. The trial court characterized the affidavit as "skimpy" 270 F.Supp. at 810 but sufficient, and cautioned that "[i]t would be a more desirable procedure, of course, for a commissioner, before issuing a warrant on the basis of such evidence, to require proof of the affiant's qualification to recognize the odor." Id. at 811.

All the cited cases from this Circuit have had allegations in addition to odor upon which the magistrate and trial courts found probable cause. In each case the smell was corroborated and was smelled by government law enforcement officers who were the affiants for the search warrant. In the case at bar there is merely smell, it was smelled by a non-governmental person and corroborated by no one. Those factors found to be important in the Second Circuit cases are absent here.

Furthermore, stripped of the misrepresentation, the affidavit indicates no reliability of smell upon which probable cause can be based. As mentioned in the previous section, dicta in JOHNSON indicated Justice Jackson's prerequisites for a valid warrant based on smell.

> If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant.

Id. at 13. See also LEWIS, 392 F.2d at 380. However the assertion of the informant's accuracy alleged by Agent Sweikert is not based on smell alone. Paragraphs 6 and 7 of Sweikert's affidavit (Fanelli Appendix at 19) state

> That said source of this information has proven himself reliable in the past based upon approximately 40 cases leading to over 70 arrests and an aggregate recovery of marijuana in excess of 2000 pounds. That said source relies among other things on an acute sense of smell which has been invariably accurate in the past detection of marijuana in similar circumstances as those at present. That he detected marijuana under similar circumstances about five weeks ago, and that among his many instances of detection there was one seizure of over 120 pounds of marijuana at Penn Station, N.Y.C. within the past year that was contained in a foot locker and a suitcase under similar conditions as those here.
>
> That the source is certain he has detected the aroma of marijuana emanating from the aforementioned baggage and that based on his past experience, skills and the indicators developed such as a disproportionate ratio of baggage weight to size, he has concluded that a large amount of marijuana is being transported on said train.

Id.

These paragraphs indicate that Agent Sweikert bases the informant's accuracy at spotting marijuana-laden luggage on his past performance which " . . . relies among other things, on an acute sense of smell . . . "; and (in paragraph 7) "indicators developed".

The court is therefore presented with an informant whose accuracy is based on certain indicators (one of which was the misrepresented size/weight ratio) but whose allegation of marijuana presence was based only upon one of those indicators i.e. smell. Obviously the informant has no reliability in the affidavit based upon smell alone and thereby the uncorroborated information presented to the magistrate cannot meet the "prongs" of AGUILAR V. TEXAS, 378 U.S. 108 (1964) and SPINELLI V. UNITED STATES, 393 U.S. 410 (1969) which require that

> the magistrate . . . be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was credible or his information reliable.

AGUILAR at 114 (citations and footnotes omitted).

As to the underlying circumstances from which the informant concluded that the marijuana was where he claimed it was, Agent McCravy testified that when he spoke with the informant about

the marijuana the informant merely said that the luggage did emit an odor of marijuana but did not disclose how he came to learn this (T. at 24). This omission was also noted by the trial court (T. at 72). The informant did not tell how he came to detect the odor of marijuana in this case or his other cases (T. at 24-26). Further, the allegation about 40 cases leading to 70 arrests and seizure of 2000 pounds of marijuana was found by the trial court to be "generalized reliability" because it was not apparent whether those cases dealt with scent (T. at 41-42). Likewise, the allegation of "invariable accuracy" is a conclusion to be drawn by the magistrate rather than Agent Sweikert and which must be supported by underlying circumstances for a finding of probable cause. But the underlying circumstances alleged are not instances relying solely upon smell as is the instant case - they are instances of relying on, "among other things", the odor factor. Page 6 of the hearing indicates that there were instances when the informant believed luggage to contain marijuana when he did <u>not</u> state he smelled the marijuana. The third sentence in paragraph 6 of the affidavit begins the allusion to two instances of marijuana detection by the informant. One instance is described as occurring "five weeks ago" under "similar circumstances". Agent Sweikert admitted he was told nothing specific and did not inquire because he thought it dealt with the

San Diego area and Agent Sweikert was primarily interested in the Penn Station case (T. at 50-51). There is only one specific smell case mentioned, that being the Penn Station case (T. at 51), but even that case is not alleged as a "smell-alone" case but merely "similar conditions". But "similar circumstances" and "similar conditions" again are conclusions of reliability which are to be drawn by the magistrate, not the affiant. Here, the touchstone of smell is not credibility but accuracy. No allegation is made to the trustworthiness of the informant so the affidavit depends on his track record for the accuracy of his detection, AGUILAR, Supra. The affidavit indicates that smell is only one of the "indicators" utilized by the informant to detect marijuana. When Agent McCravy was asked about the size/weight disproportion, he answered that it was frequently the case but it was not "germane to this particular case" (T. at 25).

Therefore this Court is presented with an informant whose past accuracy at detecting marijuana depended on a combination of indicators but whose present allegation as to marijuana is based upon smell alone. His present assertion of marijuana presence fails that prong of AGUILAR requiring that the informant's information be reliable.

II. THE MISREPRESENTATION WAS SUCH AS TO REQUIRE SUPPRESSION REGARDLESS OF MATERALITY

The testimony adduced at hearing in this case indicates that the misrepresentation was a knowing misrepresentation, and therefore suppression is required, UNITED STATES V. CARMICHAEL, 489 F.2d 983 (7th Cir. 1973) (en banc); UNITED STATES V. THOMAS, 489 F.2d 664 (5th Cir. 1973); UNITED STATES V. BELCULFINE, 16 Cr. L. 2298 (1st Cir. 1974); see generally Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 825 (1971).

At hearing, Agent McCravy testified that although the weight to size ratio is frequently used, it was not germane to this particular case (T. at 25) and that the informant never indicated to McCravy that there was something about the size of the luggage that led him to believe marijuana was contained therein. The informant did mention the weight but not as being unsual (T. at 24). However, Agent Sweikert maintained that everything in the affidavit was told him by McCravy (T. at 151). Either McCravy is misstating what he was told by the informant or Sweikert is misstating what he was told by McCravy. In both cases the conversations were personal; the informant speaking to McCravy (T. at 11) and McCravy speaking to Sweikert (T. at 151). Furthermore, there were two telephone conversations between McCravy and Sweikert to confirm the information which went into

the affidavit (T. at 104). Add to this the numerical inaccuracies of the occasions of the informant's prior information (T. at 6, 17, 29), (it developing that his experience was in 25 to 30 prior cases rather than the 40 alleged in the affidavit); the overstating of the informant's cases which dealt with smell (the affidavit indicating all his prior cases deal with smell where actually only about one-half of the 25 to 30 did (T. at 101)); the vague and conclusory assertions of "similar circumstances" and "similar conditions" (paragraph 6 of the affidavit, Fanelli Appendix at 19); and the use of the word "detected" rather than "smelled" in the affidavit, and the court is presented with a situation where the affiant has imposed upon the magistrate. When the affiant says "in similar circumstances as those at present" and "under similar conditions as those here" he is also misstaing because in those prior instances the informant relied on smell among other things, but here he relies on smell only. It is submitted that these factors indicate a knowing misrepresentation on the part of Agent Sweikert. If McCravy never told Sweikert that the informant had based his conclusion on weight to size ratio, and Sweikert swore that the informant had based his conclusion on weight/size, and McCravy and Sweikert spoke twice to confirm what McCravy had reported to the New York Drug Enforcement Administration office (T. at 104), the conclusion is clear that the misstate-

ment of weight to size ratio was made knowingly.

CONCLUSION

For the above stated reasons, all fruits of the search should be suppressed and the indictment found against David G. Fanelli must be dismissed.

RESPECTFULLY SUBMITTED
The Defendant-Appellant
DAVID G. FANELLI,

BY _____
JOHN D. JESSEP
KOSKOFF, KOSKOFF, RUTKIN & BIEDER
1241 Main Street
Bridgeport, Connecticut 06604